

FCC Opens New Proceeding to Identify Best Legal Approach to Broadband

Legal Alert
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Garvey Schubert Barer Legal Update, June 25, 2010.

The FCC has initiated a new proceeding to consider possible frameworks for addressing the regulatory status of broadband services. See *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, FCC 10-114, Notice of Inquiry (rel. June 17, 2010). Until a recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast*), there was a settled approach to facilities-based broadband Internet service, which combined minimal regulation with meaningful FCC oversight. The *Comcast* opinion, however, held that the FCC went too far when it relied on its “ancillary authority” to enjoin a cable operator from secretly degrading its customers’ lawful Internet traffic. *Comcast* appears to undermine prior understandings about the FCC’s ability under the current framework to provide consumers basic protections when they use today’s broadband Internet services. The *Comcast* decision and related developments have led the FCC to seek comment on its legal framework for broadband Internet service.

First addressing the wired service offered by telephone and cable companies and other providers, the FCC seeks comment on whether its “information service” classification of broadband Internet service remains adequate to support effective performance of the FCC’s responsibilities. The FCC then asks for comment on the legal and practical consequences of classifying Internet connectivity service as a “telecommunications service” to which all the requirements of Title II of the Communications Act would apply. Finally, the FCC identifies and invites comment on a third way under which it would: (i) reaffirm that Internet information services should remain generally unregulated; (ii) identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service; and (iii) forbear under section 10 of the Communications Act from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support. The FCC seeks comment on the same issues as they relate to terrestrial wireless and satellite broadband Internet services, as well as on other factual and legal issues specific to these wireless services that bear on their appropriate classification. The FCC further seeks comment on discrete issues, including the states’ proper role with respect to broadband Internet service.

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The FCC emphasizes that the purpose of the NOI is to ensure that it can act within the scope of its delegated authority to implement Congress' directive with regard to the broadband communications networks used for Internet access. The FCC does not suggest regulating Internet applications or the content of Internet communications. Nor does the FCC seek to address in the NOI other Internet facilities or services that currently are lightly regulated, such as the Internet backbone, content delivery networks (CDNs), over-the-top video services, or voice-over-Internet-Protocol (VoIP) telephony services.

Comments in this proceeding are due on or before July 15, 2010; reply comments are due on or before August 12, 2010.